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In the Supreme Court of the United States

October Term, 1974

No. 74-1523

ROBERT DODSON, *et al.*,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals
For the Eighth Judicial District of Ohio

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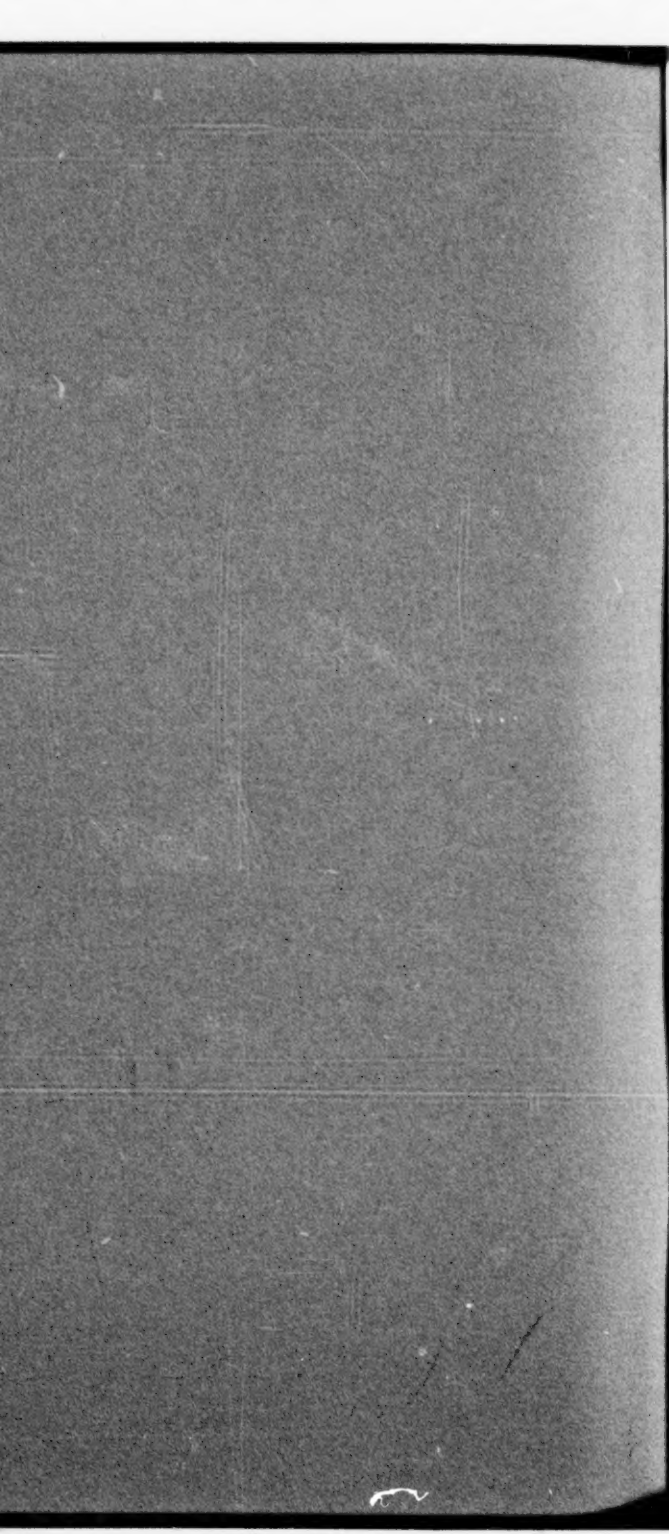

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In the Supreme Court of the United States

October Term, 1974

No. .....

ROBERT DODSON, JOHN L. JACKSON, GIRTHA MOORE, LAVERNE NICHOLS, JESSE I. WILLIAMS, and LAWRENCE MOORE,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals
For the Eighth Judicial District of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Robert Dodson, John L. Jackson, Girtha Moore, Laverne Nichols, Jesse I. Williams, and Lawrence Moore, pray that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on March 28, 1975.

OPINIONS OF THE COURTS BELOW

The opinion and journal entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is attached as Appendix "A" *infra*, at page 39. The judgment entries of the Supreme Court of Ohio denying further appellate review are Appendices "B" and "C", *infra*, at pages 48 and 49. The journal entry of the Common Pleas Court (the trial court) is Appendix "D", *infra*, at page 50.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on March 28, 1975. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1257(3), on the basis that rights, privileges, and immunities under the United States Constitution are contended to have been violated.

STATEMENT OF QUESTIONS INVOLVED

1. Whether an undisclosed and possibly phantom informer's credibility can be established by the affiant's mere unsupported and unparticularized conclusory assertion that he had in the past provided information which proved to be reliable and which resulted in the conviction of gambling violators.

2. Can a search warrant be validated where the affidavit contains intentional and recklessly untruthful statements, willfully deceptive statements, or unintentional misrepresentations of a material fact.

3. Whether a state appellate court in evaluating a trial court's determination that no probable cause existed

for the issuance of a search warrant, and that the affidavit contained material segments of misinformation, can ignore the "fundamental criteria" laid down by the controlling decisions of the Court interpreting the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitution of the United States:

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

Amendment XIV:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code, Section 2915.13:

No person shall establish, open, set on foot, carry on, promote, make draw, or act as "backer" or "vendor" for or on account of a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years.

Ohio Revised Code, Section 2935.12:

When making an arrest or executing a warrant for the arrest of a person charged with an offense, or a search warrant, the officer making the arrest may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make such arrest or such search, he is refused admittance, but an officer executing a search warrant shall not enter a house or building not described in the warrant.

Ohio Criminal Rule 41(C):

A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge to a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall

issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed and made part of the affidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown authorizes its execution at times other than daytime. The warrant shall designate a judge to whom it shall be returned.

STATEMENT OF THE CASE[1]

The undisputed facts show that on November 29, 1974, a warrant was issued for the search of the premises at 10400 Buckeye Road, Cleveland, Ohio. This warrant was executed on the same day, and those persons characterized in this cause as petitioners were arrested. In turn, they were charged and later indicted for allegedly violating R. C. of Ohio, §2915.13. More specifically, the charge was that they "unlawfully did establish, open, set on foot, carry on and promote a certain scheme of chance known as Numbers Game, to wit: Clearing House."

---

1. Whenever reference is made in this petition to the record in the trial court it will be preceded by the prefix "R".

Prior to trial, the Court considered a "Motion to Suppress and for the Return of Illegally Seized Property." This motion set forth the following contentions:

(1) That the affidavit fails to set forth probable cause for the belief that "the entire building known as 10400 Buckeye, . . . and any garage or storage area furnished by said building . . . occupied as the office for the Sue Griar Realty Company and any other individual" thereon unlawfully had in their possession the property described in the warrant.

(2) That the conclusory allegation to the effect that the unnamed informant had "provided information in the past which was proven reliable and which . . . resulted in the arrest and conviction of gambling violators," plus the assertion in the affidavit that the "informant has cooperated with the police in many instances. . ." fails to conform with the mandatory requirement that some of the underlying from which the affiant concluded his informant was reliable and his information credible must be specifically set forth in the affidavit.

(3) That the affidavit fails to set forth a sufficient basis for the informant's conclusion that the premises described in the warrant were being "used as a clearing house office for the promotion of a numbers game."

(4) That no probable cause is set forth (save and except the conclusory allegations attributed to the unnamed informant) to support the belief that Robert Dodson was in charge of a numbers office at the described premises.

(5) That the affiant's naked allegation that "he has frequented the above described building . . ., and that those persons coming and going are personally known to the affiant in connection with his police duty as a member of the vice enforcement unit" not only fails to provide any specific corroboration for the informant's assertion that Dodson had been seen on these premises, this statement itself is factually deficient. (Here reference is being made to the fact that the affidavit itself verifies that, even after the affiant's personal surveillance, he could only generalize that he saw "individuals" who had been known to be past violators of the gambling laws of this State enter these premises.)

It was further contended, in this motion, "that in spite of the express requirements of R.C. of Ohio, §2935.12 (that notice of authority and purpose are required before a forcible entry can validly be made), and the complete absence of exigent circumstances that might otherwise have justified the immediate entry into these premises, the use of force to break down and through the various doors to forcibly gain entry cannot be squared with the requirements of due process." And, "that the warrant, which forms the basis for the searches conducted in this case, and which was styled a search warrant was in fact an arrest warrant, for it provided for the seizure and search of all individuals on the premises. Given this broad range, the warrant must be regarded as a general warrant and as such it violated the constitutional rights of those victimized thereby."

The trial court determined, without reaching these latter contentions, that the affidavit failed to comply with the constitutional requirements. More specifically, the trial court determined that "the affidavit is replete with

conclusions of the affiant, but the facts upon which those conclusions are predicated are not set forth in the affidavit. In addition, there is some misinformation set forth in the affidavit" (R. 77).

On appeal, the Court of Appeals reversed this determination by the trial court and remanded this case for further proceedings according to law (See Appendix A, *infra*, at page 47).

This Petition is submitted to show that this Court not only has jurisdiction but should evaluate the propriety and wisdom of the Court of Appeals' apparent unwillingness to consider itself bound by the controlling decisions in this area of the search and seizure spectrum.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Preliminary Statement

Given the trial court's determination that the warrant here was issued and executed without probable cause, the essential issue then must be whether this finding comports with the requirements of controlling tenets.

Based on the contentions raised by the Motion to Suppress, the Court of Appeals and ultimately this Court, must consider not only whether the affidavit for the warrant revealed probable cause for the issuing court to believe illegal gambling activities were being conducted on the premises sought to be searched, but whether the trial court's determination must be validated no matter how much this judgment may be inconsistent with the determination some other Judge may have made on the same facts.

The affidavit (see Appendix "E", p. 51), to which reference has been made, assertedly contained surveillance information and hearsay information supposedly supplied by an unnamed informant.

In the first instance, then, the issuing court was required: (1) to determine the truthfulness of the source of the information, and (2) to meaningfully evaluate the adequacy of the factual premises furnished by that source to support the validity of the source's conclusion. In one sense, it is judging the integrity of a person, in the other, it is judging the logic of a proposition. These distinct functions are analogues of those performed by the ultimate finder of fact who both assesses credibility and then determines the weight to be given the testimony of that witness.

Where, as here, the source of the alleged information is unnamed (and possibly a phantom) the affidavit must set forth sufficient background information for the court to judge for itself the credibility of the unnamed source and the reliability of his information. To conclude trustworthiness is probably present, the Court must be convinced either that the source as a person was inherently honest and credible, or in the absence of such proof of the informant's character, that the information was furnished under circumstances redolent with assurances of trustworthiness. *Spinelli v. United States,* 393 U.S., at 425 (Concurring opinion).

Here, of course, credibility and reliability were sought to be established for this asserted informant on the basis of the naked conclusion that his information was reliable because he supposedly had "provided the affiant with information in the past", which had been "proven to be reliable and which . . . [had] resulted in the arrest and conviction of gambling violators."

It is beyond dispute, however, that a magistrate may no more accept with impunity an affiant's assertion that his source is credible than he could accept an affiant's assertion that he himself is credible as a substitute for his taking the oath. See *Spinelli v. United States*, 393 U.S., at 424. Also, and this too is a relevant concept here, even if it is concluded that the informant was credible, it still must be determined what the asserted information is worth. This is so because *one cannot accept the hearsay conclusions of even a credible informant any more than he could accept the sworn conclusions of a credible affiant. United States v. Ventresca*, 380 U.S. 102, at 108-109. What is required is meaningful information to substantiate a credible informant's conclusion.

As applied here, our affiant attributed to his supposed informant the conclusion that the premises were being "used as the clearinghouse for the promotion of a numbers game." Supposedly the informant had "visited these premises." (No mention of what he saw was made.) Then it was added (also in conclusory language) that "numerous violations of the law" were occurring on the premises, and that Robert Dodson was the person in charge.

Doubtless it was because the affiant knew that absent additional or "further support" for his alleged informant's information (*Spinelli*, 393 U.S., at 418) that he sought to bolster his affidavit by information supposedly gained by surveillance of the premises.

Of significance here (the affidavit fails to set forth even the suggestion that Dodson had been seen during these observations), the affiant only stated, again in conclusory terms, that he saw "individuals who had been known to be past violators of the gambling laws of the State of Ohio enter the . . . [described] premises," and

that "those people coming and going are personally known to the affiant in connection with his police duty as a member of the vice-enforcement unit."

Here, the crucial allegations were:

"The affiant [Captain Carl Delau] further states that upon receiving this information he personally has maintained a surveillance of the above described building for the past week.

Affiant states that he has been a member of the Cleveland Police Department for approximately twenty-seven years and that during his period of employment he has had occasion to know many violators of the gambling laws of the State of Ohio. During his surveillance of the above described premises affiant states that *he has seen individuals who have been known to be past violators of the gambling laws of the State of Ohio enter the above described premises.*

Affiant states that he has frequented the above described building known as 10400 Buckeye Road, Cleveland, Ohio, *and that those people coming and going are personally known to the affiant in connection with his police duty as a member of the Vice-Enforcement Unit.*

Affiant states that he has information that Robert Dodson has entered the above described building on at least three separate dates during the past week. Further affiant states that another individual known to be involved in gambling violations has been seen entering the above described building on at least two separate dates during the past week.

> Affiant states that one Robert Dodson is personally known to him in connection with his police duties as a member of the Vice-Enforcement Unit, and that Robert Dodson has a history of clearing house violations." (Emphasis supplied.)

In assaying our position, it must be conceded as even the affiant admits: (1) that nowhere in his affidavit does he state that *he* saw Dodson enter these premises (R. 24), and (2) that the statement in the affidavit that he had information Dodson had "entered the premises during the past week" suggested he was only relying on information given him.

This brings us then to the affiant's allegation that he had seen *individuals* who were past violators of the State's gambling laws enter these premises. Here it was testified that he was referring to Robert Dodson (whose name was not mentioned) and the petitioner Jackson "though he has no arrest" and to the petitioner Moore (R. 21). Here, the record shows, by the officer's own admission, that in 1970, Moore had been arrested in an after hours cheat spot, along with 30 or 40 others. Further, the officer conceded he *did not* have any knowledge that Moore had previously been convicted of a "numbers violation" (R. 35).

Then there was affiant's statement that Dodson was personally known to him and that he [Dodson] had a history of clearing house violations (R. 42). Upon examination, this statement turned out to mean Dodson had been arrested in 1961 for the mere possession of clearing house slips (R. 43).

On the other hand, even assuming Dodson had been seen by Captain Delau entering these premises *and* this event had been stated in the affidavit, the fact still remains

Dodson's previous conviction had occurred in 1961. Not only this, it had been for the mere possession of numbers slips as distinguished from the operations charge for which the warrant here was being sought. Then, too, there is the fact that a convicted gambler does not forever walk through life enveloped in probable cause.

As applied here, this raises the question as to whether an undisclosed informant's tip that a particular man is operating a clearing house at a given address can be deemed corroborated by the fact that the officer to whom this information was given was aware the person referred to had been convicted more than 12 years before for a single gambling offense.

Other relevant features of Officer Delau's evidence, which clearly show the extent to which he will go to vindicate a position taken by him, can be gleaned from the following segments of the record. These are included because his credibility was likewise an issue for evaluation, and was obviously resolved against the State by the trial court. (The trial court specifically noted that the affidavit contained "some misinformation" [R. 77].) Here the record shows:

(1)

> Q. Now it states in your affidavit, . . ., the second page. . . 'Affiant states in talking with the informant, the informant has advised the affiant that the building is presently being used by one Robert Dodson, who is in charge of maintaining this building as a clearing house and for use in other crime violations.'
>
> A. The affidavit does read that way.
>
> Q. So it doesn't state in here that your informant had stated that the clearing house office was on the second floor, does it

A. No, it does not.

Q. It does not. Then, is it your testimony that although the informant told you that the second floor of this building was being—a portion of the second floor of the building was being maintained as a clearing house office, that you nevertheless told the Court in your affidavit that the informant had told you the entire building was being so used?

A. I was advised by the Prosecutor that due to the fact that Dodson entered the front door and went up the stairway, the search warrant should include the whole building.

Q. But the Prosecutor can't get you to swear to something that is untrue?

A. As far as I am concerned, Dodson was making use of the first floor to get to the second floor.

Q. No, no, the Prosecutor can't advise you to swear to something that is not true?

A. There is no untruth here.

Q. Let me ask you this. It says here, 'The Affiant' now you are the affiant, right?

A. Yes, sir.

Q. And it states, and I quote, and I will use your name for the affiant so it will be clear:

Captain Carl Delau 'further states in talking with the informant, the informant has advised' him 'that the building is presently being used by one Robert Dodson, who is in charge of maintaining this building as a clearing house *and for use in other crime violations.*'

Now my question is simple. Did the informant advise you of that?

A. He advised me that the second floor was being used.

Q. Then . . ., it is true that the informant did not advise you that the entire building was being used?

A. The thing is, they had access to the entire building.

Q. Well, where does it state in your affidavit that the informant says Mr. Dodson has access to the building?

A. That is not in there.

* * * * *

Q. (By Mr. Willis) So that your testimony is that although the informant had told you that the second floor was being used, that's where the office was?

A. Correct.

Q. That the Prosecutor advised you to say that the informant had told you that the entire building was being used?

A. The Prosecutor advised me to get the search warrant for that reason for the search of the entire building.

Q. Now, regardless of what you got the search warrant for, we are talking now about what you stated in your affidavit, it does not appear in your affidavit that the informant had advised you specifically that the clearing house office was on the second floor—that doesn't appear in here, does it?

A. No, it does not.

Q. Now, when you learned, did you not, sir, that there were several tenants as well as a construction company that had offices on the second floor, you learned that, didn't you?

A. Once I was there. (R. 36-39).

(2)

Q. So that if I understand you, also on your affidavit, you indicated that the informant told you

there was some other criminal violations taking place up there, other than maintaining this building as a clearing house. That's in the same paragraph we were reading?

A. It does say that, but it all relates to the gambling operation or running a clearing house operation.

Q. So that—

A. Which is specified in every instance in the search warrant affidavit.

Q. Yes, but the affidavit does tell the Judge, who is issuing this warrant, that you had definite information that Mr. Dodson was using this building *not only for maintaining a clearing house operation, but for use in other criminal violations; it says that, doesn't it*?

A. Yes, it does, related crime to the gambling clearing house operation.

Q. But that word 'other' means something different, doesn't it, from gambling?

A. Not in my understanding. (R. 41-42). (Emphasis added.)

(3)

Q. Now where in here do you state that Mr. Jackson had been described to you and that your knowledge that he was a past violator was based on some information that had been supplied to you?

A. It is not mentioned in that at all—by name, it is not.

Q. It is not in here?

A. No, sir.

Q. And you indicated that Mrs. Moore—

A. Mr. Moore.

Q. Mr. Moore was a past violator that was known to you?

A. Only by his arrest record.

Q. And when did this date back to?

A. I think he has a conviction in 1970.

Q. Now when did you know that Mr. Moore had been on those premises?

A. When I went to the Prosecutor on the 29th.

Q. How did you get his name?

A. The same way I got things out in the street about Mr. Dodson.

Q. In other words, someone had told you that there would be a man there by the name of Moore?

A. Yes.

Q. But nowhere in the affidavit did you put that?

A. It is not mentioned.

* * * * *

Q. Now, the next paragraph, it states: 'Affiant states that he has frequented the above described building known as 10400 Buckeye Road, Cleveland, Ohio, and that those people coming and going are personally known to the affiant in connection with his police duty as a member of the Vice-Enforcement Unit.' You recall saying that?

A. That's in here, yes.

Q. Now who were the people that you saw coming and going that were personally known to you in connection with your duties as a member of the Vice-Enforcement Unit?

A. *Dodson is the only one I have arrested myself, that I have personal knowledge of.* Jackson as I indicated, was identified to me as being on the premises and actively involved in the operation of this office.

Q. But that is not in the affidavit, either, is it?

A. No, sir.

Q. All right, and who else?

A. And Mr. Moore because of the record he has I was aware of that and that's not mentioned in the affidavit.

Q. That's not mentioned here, either. Now, the next paragraph, it states: 'Affiant states that he has information that Robert Dodson has entered the above described building on at least three separate dates during the past week.' That statement is attributed to you, isn't it?

A. Right.

Q. *Now where in your affidavit did you state that you had personally seen Mr. Dodson enter the premises*?

A. *It isn't mentioned here.*

Q. It is not mentioned in your affidavit?

A. I related it to the Prosecutor.

Q. All right, you told the Prosecutor.

A. Correct.

Q. But it is not in this statement, is it?

A. But it states that he entered—

Q. No, the fact that you, *personally,* saw Robert Dodson enter the premises, that is not stated in your affidavit, is it?

A. No, it does not mention—just so many words.

Q. It doesn't mention it in any words, does it?

A. That I have seen him, no. (R. 22-24). (Emphasis added.)

(4)

Q. Now my question is the statement as is set forth in this affidavit suggests, that you simply are relying on information given to you by the informant that Robert Dodson had visited the premises? That's what that indicates, doesn't it?

A. That's true.

Q. Now, you just told us that the informant had told you that Robert Dodson went there daily—you just said that, didn't you?

A. Correct.

Q. But in your affidavit, you stated that the informant had indicated Mr. Dotson [sic] had been seen there on three separate occasions during the past week?

A. Three days that I made observations of him—I had seen him, yes.

Q. No, let's read your statement here. The statement says: "Affiant states that he has information"—that means you got information from somebody else that Robert Dodson has entered the above described building on at least three separate dates during the past week. Now that indicates that the informant told you that he—I mean that Dodson—had gone in there on three separate occasions during the past week. That doesn't mean every day, does it?

A. All right, what is in here? States three dates, and he was there three days, plus more.

Q. According to what the informant told you?

A. Yes.

Q. Right, but that's not in here, that you made any surveillance which showed Dodson appearing there personally. That is not in the affidavit, is it?

A. It may not be in there.

Q. Not may—just look and tell us whether or not it is there.

The Court: Officer, I suggest you read it over very carefully and answer the question either yes or no.

While the witness is perusing the affidavit, would you gentlemen, counsel, approach the bench, please?

• • • • •

The Court: Captain, have you read the exhibit?

The Witness: Yes, sir, I have.

The Court: Are you prepared to answer the question?

The Witness: It does not state there that I have seen him enter on three specific dates, any dates, as such. It is included here in this particular paragraph as you mentioned.

Q. (By Mr. Willis) As a matter of fact, it doesn't state that you ever saw Dodson enter the premises?

A. It does not, no—*people known to me personally—and that was Mr. Dodson.* (R. 25-27).

(5)

Q. Captain Delau, you indicated that you saw Mr. Jackson driving a particular car?

A. Yes, sir.

Q. And what kind of car was that, sir?

A. The Opel.

Q. And what day was it that you saw him, if you recall?

A. On the 26th and the 27th.

Q. And on one of these days—was he driving the Opel on both these occasions?

A. Correct, yes.

Q. And I think you told us on one of the occasions you saw him take something out of the trunk of the car, is that right?

A. Yes, sir.

Q. What was that?

A. I don't know; it was a package.

Q. What did he do with it?

A. He put it in his hand and walked away then.

Q. He didn't leave the trunk open, did he?

A. I can't say he did, no, he did not.

Q. So you saw him open the trunk and close the trunk?

A. Yes.

Q. No question in your mind about that?

A. No.

Q. All right, what color was that Opel?

A. A red Opel.

Q. Captain Delau, isn't it a fact that an Opel doesn't have a trunk?

A. I am not aware of that, sir.

Q. Obviously couldn't be true because you saw him open the Opel?

A. Trunk or storage space or whatever you want to call it.

Q. It was back there in the back of the car?

A. Correct, sir.

Q. Would you be able to identify that Opel for the Court if you were to see it again?

A. I believe so, by license number, I would say.

Mr. Willis: Your Honor, at this point, I would like to suspend questioning Captain Delau in order that Mr. Jackson can pull his Opel outside and have Mr. Delau demonstrate to the Court the trunk that he saw Mr. Jackson open in connection with that car. . . .

The Court: Mr. Prosecutor?

Mr. Wagner: Your Honor, I would object to this; . . . .

* * * * *

The Court: This is cross-examination, Mr. Prosecutor, and the Court feels that the question is sufficiently important to permit counsel to have inspection of that car. The witness may demonstrate what part of the car he saw the defendant Dodson—

Mr. Willis: No, Jackson.

The Court: Is that correct?

The Witness: Jackson, yes, sir.

The Court: Jackson take something out of the trunk. The Court will grant the request and we may proceed to view the car. You want the Court to observe—

Mr. Willis: Yes, can we have Mr. Jackson pull the car right around to the side of the building?

The Court: All right, if you can, right outside the front and we can look at it from up here.

* * * * *

The Court: . . . May it be stipulated by and between the Prosecutor and Counsel for the defendants that the car identified by Captain Delau, the witness, does not have a trunk?

Mr. Willis: Yes, sir.

Mr. Wagner: Yes, sir.

The Court: Let the record so show; it is so stipulated by and between the Prosecutor and counsel for the defendants. Proceed. (R. 28-32).

I

An Undisclosed Informant's Credibility Is Not Established By an Affiant's Mere Unsupported and Unparticularized Conclusory Assertion That He Had In the Past Provided Information Which Proved to Be Reliable and Which Resulted in the Conviction of Gambling Violators.

Counsel for the State, whose position is really somewhat difficult to assay, argued in the Court of Appeals that the remarks attributed to the informant show he "had personal knowledge of the fact . . . that illegal num-

bers or clearing house activity was taking place on the premises" (*Appellee's Brief* [in the Court of Appeals], p. 4). Next, he contends that the reliability of the alleged informant was established by the recited "instances wherein . . . [his] previous information was credible" (*Id.*, p. 7).

Distilled, the information supposedly furnished by this so-called reliable informant only produces the conclusory contention by him that the building was being utilized by Robert Dodson for *illegal purposes*. To this was added the allegation that he had been on the premises.

As to this there are, of course, no ritualistic incantations which, once discovered, will serve to satisfy the requirements of due process. Rather, what is required are sufficient facts and details to permit the Court to make an informed judgment.

In this sense, the affiant should pass on to the magistrate all he knows about his informant short of compromising his identity (when such secrecy is required). If, for example, the informant has strong religious scruples against bearing false witness, the magistrate should be told, and if he once confessed to having committed criminal acts himself, or the affiant is aware of the fact of his informer's past misdeeds, this too should be told.

Here, too, the State contends their informant passes the credibility-reliability test because the affiant credited him with having furnished him information "in the past" which resulted in the arrest and conviction of gambling violators. As to the phrase, "in the past", it could mean the distant past, or the immediate past or even in between. Also, it does not follow that because an informant gave reliable information "in the past" he is forever credible.

Surely then, if this makes sense, more specificity was required here at least as to when the past information was received and about how many arrests and convictions resulted therefrom.

Upon inspection, the affidavit here not only failed to indicate when this information had been supplied in the past, but also failed to relate whether as a result of these asserted arrests evidence turned up which he indicated would turn up. It did not state whether his information was the exclusive predicate for the arrest, or whether it was but a minor contributing factor. On the other hand, if the informant was indeed deemed reliable for purposes of the earlier arrest, what were the supporting facts which made him so then.

Stated another way, absent the allegation that the informant had never given information which proved to be incorrect, the issuing magistrate was crippled in making the informed judgment contemplated by the Fourth Amendment. For, surely, if the furnishing of good information contributes to a belief in an informant's credibility, then the furnishing of bad information in the past would derogate therefrom. Thus, the danger exists here that the affidavit contains only half truths. This possibility becomes even more obvious in face of the affiant's incredible testimony at the trial.

Here, reference is being made to those segments of his cross examination which expose him to be the type of person whose testimony and affidavit should always be considered with circumspection, and only validated when corroboration for his assertions is manifest.

In any event, for aught that appears, the affiant's failure to disclose or otherwise identify his informant leaves us with the presumption he (or she) is a typical police

informant from the criminal milieu. This fact alone requires that his contributions be subjected to a cautious and skeptical scrutiny. In this sense, surely it must be recognized there is no premium on confidentiality except where confidentiality is really required. Here, the affidavit makes no such claim.

But, of course, this is usually the case in Cleveland, and will continue to be such, unless this Court exposes the vice of routinely characterizing informers as confidential, which, in most situations, is the result of no more than verbal conventions or linguistic habit. See *People v. Glaubman,* 485 P.2d 711 (Colo. 1971).

The point of all this is that it must, or at least should, be clear that an undisclosed informant's credibility is not established by an affiant's mere unsupported and unparticularized conclusory assertions that he (or she) "in the past" furnished the Police Department reliable information.

II

An Intentional or Recklessly Untruthful Representation Will Result in an Invalidation of a Warrant as Will an Unintentional Misrepresentation, or a Willfully Deceptive Representation of a Material Issue of Fact.

Next, it is conceded, as the State inferentially argues, that even when the internal evidence about the informant himself or the information supposedly supplied by him, fails to establish intrinsically personal credibility or informational-reliability, other evidence in the affidavit may otherwise satisfy the alternate route to probable cause developed in the wake of *Spinelli.* Here, this gap was sought to be bridged by the product of certain surveillances

assertedly made by Captain Delau. Ostensibly, these were undertaken to verify, or corroborate, the informant's information.

Looking then, under *Spinelli*,[2] to the observations as reported in the affidavit. Here, it was reported that the affiant observed *individuals* who had been known to be past violators of the State's gambling laws enter these premises, and that those *persons* going and coming were personally known to him in connection with his duties as a Vice-Enforcement Unit officer.

At the risk of being unduly repetitious the absolute fact is Delau admitted in his evidence that the reference, in his affidavit, to the people going and coming who were known to "him personally", meant Robert Dodson (R. 27). Hence, the assertion in his affidavit is more than merely deceptive. It must be regarded as willful. This is especially so since the officer was so obviously being less than candid when he placed the assailed assertion immediately following his statement that, "he had been a member of the Cleveland Police Department for approximately twenty-seven years and during his period of employment, he . . . [had] had occasion to know many violators of the gambling laws of the State of Ohio."

Surely, then, it must be as obvious to this Court, as it was to the trial court that the considerable amount of misinformation in the affidavit was deliberate.

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2. As to this buttressing technique, this Court, in *Spinelli*, indicated that "if the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered." The question then is "can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* test without corroboration?" 393 U.S., at 415.

The question thus created, one which may be viewed as novel for our courts (at least our research has not uncovered any cases on this point), involves the effect of inaccurate or willfully false statements in an affidavit. A possible explanation for this could be the fact that this Court has not clearly decided this issue. See *Steele v. United States*, 267 U.S. 498, at 501 (1925).

Other Courts, however, have concerned themselves with the problems created where, as here, a showing of deception, falsehoods, misrepresentations, or imposition on the magistrate is made. The leading cases on this point include *United States v. Carmichael*, 489 F.2d 983 (7th Cir. 1973); *United States v. Thomas*, 489 F.2d 664 (5th Cir. 1973); and *United States v. Marihart*, 492 F.2d 897 (8th Cir. 1974).

In *Carmichael*, the Court took the position that a defendant is absolutely entitled to show any misrepresentation by the affiant of a material fact in his affidavit, or an *intentional* misrepresentation whether material or not. Further, that if a deliberate misrepresentation is shown, "the Court need not inquire as to . . . [its materiality]." *Id.*, at 988-989. Where the misrepresentation is negligent, or reckless, the *Carmichael* Court would then determine whether it affected the issuance of the warrant (*ibid.*). The Fifth Circuit, in *Thomas*, held that,

> ". . . affidavits containing misrepresentations are invalid if the error (1) was committed with an intent to deceive the magistrate, whether or not the error is material to the showing of probable cause; or (2) made nonintentionally, but the erroneous statement is material to the establishment of probable cause for the search." (489 F.2d, at 669.)

The Eighth Circuit Court in *Marihart*, after considering both of these views, adopted the position as expressed in *Carmichael*. In line with this, they ruled that an intentional, or recklessly untruthful, misrepresentation will result in an invalidation of a warrant as will an unintentional misrepresentation about a material issue of fact.

Quite obviously, these rules were designed to test the credibility of affiants whose testimony or affidavits are before the Court.

Guided then by either the *Carmichael-Marihart* approach, or the test as particularized in *Thomas*, there is just no way the affidavit in this case can be validated. If nothing else, Captain Delau's credibility was totally destroyed. This destruction was in no way limited to his testimony about seeing Jackson remove certain property from the trunk of his car. Even greater credibility flaws were exposed by his admission that his use of the phrase people personally known to be past violators of the gambling laws referred only to Dodson. Also, there is the fact that although Dodson was the only person known to him (that he supposedly saw enter this building), his affidavit deliberately created the false impression he had seen others enter these premises who were likewise known to him, and who were past violators.

Even this is not all, his failure to indicate in the affidavit that Dodson's conviction had been more than 12 years previous has to be viewed as deliberately deceptive. In addition, there is the irrepressible thought that Captain Delau's affidavit was made out of whole cloth. For surely, he was relying on the myth of his prestige with our Courts to vindicate his judgment that the warrant should be issued. Because, after all, he was a police captain, and it should be unthinkable that he could possibly be turned down, or that his actions would not be ratified.

III

In Evaluating a Trial Court's Determination That a Search Warrant Had Been Issued on the Basis of an Insufficient Affidavit, One Which Not Only Failed to Set Forth the Probable Cause, But Also Contained Material Segments of Misinformation; the Reviewing Court Must Do So in the Light of the "Fundamental Criteria" Laid Down by the Controlling Decisions of the United States Supreme Court Interpreting the Fourth Amendment.

(A)

The Court of Appeals' reliance on *United States v. Harris*, 403 U.S. 573 (1971), as support for one of its major premises is sorely misplaced. This is so for a variety of reasons, not the least of which is the fact that they have actually arrogated to the *Harris* decision a holding *by the Court* to the effect that a policeman's knowledge of a suspect's reputation may properly be relied on. As to this specific point, even a casual reading of *Harris* shows that the language relied on by our Court of Appeals had only the support of the Chief Justice and two other Justices. The upshot of this fact is that the other six Justices *did not* approve the dangerous principle upon which our Court has placed so much reliance. Dangerous in the sense that when you deal with an affiant as capable as the one in this case of committing perjury to justify his own actions, the ease with which he can say one has a criminal reputation affords no protection for the rest of us. See *Beck v. Ohio*, 379 U.S. 95, at 97 (1964), where this Court responded to this same officer's penchant for imputing significance to a prior arrest or conviction.

The proper view of this reference in *Harris* is that three Justices of this Court now feel that "to the extent

that *Spinelli* prohibits the use of such probative information . . . they [three of the Justices] decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation." (403 U.S., at 583.)

So structured, the crucial holding in *Spinelli*, that a reputation allegation in an affidavit "is a bald and unilluminating assertion of suspicion that is entitled to no weight" (393 U.S., at 414) must still be regarded as the law (the views of the Judge in our case, and the three Justices, to the contrary notwithstanding).

If this analysis is valid, then to the extent that the Opinion in our case relies on the inapt conclusion that "in finding probable cause for a search warrant a magistrate may properly rely upon a police officer's knowledge of the criminal reputation of the suspect" (Syllabus 2), it must be understood that this "rule" clashes with *Spinelli*. (Still another point is that the writer of *Dodson* may not have been aware, since he did not credit it in his reference to *Harris*, of the fact that a majority of this Court rejected the invitation to reject the *Spinelli* position on this point.)

(B)

The Court of Appeals (after first erroneously concluding that only the arguments (1) that the affidavit failed to pass the "credibility" standard, and (2) that the affidavit was based on misstatements were being advanced) then foisted upon us its own version of a reasoning pattern based on conclusory assertions. Here reference is being made to the assertion that "an informant's past performance is an underlying circumstance from which an affiant can properly conclude that he is credible" (Appendix A, *infra*, p. 44). This being so, the Court of Appeals then asserted

that the requirements of the *Aguilar* test were met because after all, "the affiant [here, the infamous Captain Delau, whose credibility should forever be deemed suspect, based on this record alone] concluded that the informant had provided reliable information in the past." (*ibid.*).

The one thing that is most apparent from the above distillation of the Court of Appeals' analysis is the irresistible notion that they have obviously ignored, or simply failed to recognize, the fact that the person to be convinced, especially of the undisclosed informant's credibility, is not the affiant (as stated by the Court of Appeals), but the issuing Court. This task still cannot be performed properly where the only information submitted is the affiant's naked assertion that his informant furnished information in the past.

Next, the Court stated (again in conclusory language) that "the informant's statements were corroborated by the surveillance of the premises" (*ibid.*). Since the informant's information was simply that Robert Dodson was operating a clearinghouse "on the second floor" (R. 36-39), the Court's statement can only mean this fact was corroborated by Captain Delau's surveillances. The question then is does this Record, as distinguished from the appellate court's reconstruction thereof, support that position. As we view this affidavit, the answer is obvious, it does not.

To begin with, there is the fact that the affiant, by his own testimony, admitted his affidavit does *not* contain any indication that he ever saw Dodson enter these premises. Since the only surveillances to which the Court of Appeals could have been referring were those made by Delau, corroboration could only have been furnished, if it was, by his statements that, (1) "he had seen individuals who have been past violators of the gambling laws

of the State of Ohio enter the above described premises"; (2) and that those persons coming and going . . . [were] personally known to the affiant in connection with his duty as a member of the Vice-Enforcement Unit." Further, that "Robert Dodson . . . [was] personally known to him . . . and . . . has a history of clearinghouse violations" (Appendix E, at p. 53).

Synthesized, the surveillance showed, in the light of Delau's testimony, that he *did not* see anyone enter those premises that he even knew except Dodson, whose name was not mentioned in the affidavit as having been seen by him. He says he saw Jackson enter, a person he did not "personally" know (Dodson was the only one he knew personally). The other person he says he saw enter was Moore, a person he did not know personally and who could not possibly qualify for inclusion in a category of persons who could be characterized as "past violators of the gambling laws".

This then brings us to the statement in the Court's opinion that the informant's statement (—that is, that Robert Dodson was operating a clearinghouse on the second floor of these premises) "was corroborated by the surveillance of the premise" (Appendix A, at p. 44). If our position that there is nothing in this Record that even remotely could be said to corroborate this point is inaccurate, surely the State's response papers will direct us to the relevant segments of the Record.

(C)

The Court of Appeals next argued that we cited *United States v. Damitz*, 495 F.2d 50, as supporting our position. As to this, the Brief filed by the Respondent in this case, before the Court of Appeals, will show that the *Damitz* case was not relied on by us. Rather, our Brief

relied on the cases of *United States v. Carmichael, United States v. Thomas, United States v. Marihart,* and *United States v. Dunning,* 425 F.2d 836 (1969). The *Damitz* case was simply cited during formal argument as a recently decided case dealing with the issue posed by affiants, like the one in this case, who demonstrate a penchant for being less than candid with the facts. The case was distinguished from those cases relied on.

The only reason this *fact* is being mentioned is because the Court's opinion creates the impression counsel in some way approved the holding in *Damitz.* To begin with, the Court's analysis of *Damitz* is correct. We subscribe, however, to the view expressed in *Thomas* that an intentional misrepresentation of a material fact is alone sufficient to void a warrant.

But even if our Court of Appeals' view that the *Damitz* approach is the correct one, still the affidavit here should be voided. For, the misrepresentations, to which reference has been made, are the very misrepresentations that were relied on by the Court of Appeals in its validation of this affidavit. At least this much is certain, the trial court could only have been referring to these misrepresentations when he found the affidavit contained "some misinformation."

(D)

Still another crucial reasoning flaw appears in the Court's Opinion, *infra,* at page 45. Here, the Court correctly views our characterization of Captain Delau's statement that he had seen, "individuals who have been known to be past violators of the gambling laws . . . enter . . . [the] premises", as an intentional and material misstatement (Appendix E, *infra,* p. 53).

As to this, Dodson had been convicted more than 12 years ago for the simple possession of numbers slips. Moore had the one arrest for being in a cheat spot. Since the affiant-captain did not state in the affidavit that during his asserted surveillances he saw Dodson enter these premises, it is simply not fair to say the Court issuing the warrant had to understand Dodson had in fact been seen by the captain doing so. On the other hand, if he was talking about Dodson, being fair, this officer should have stated Dodson's arrest was twelve years old. Our affiant took the reverse approach, he added Dodson was personally known to him and had "a history of clearinghouse violations". If the word violations remains plural, then this statement alone is obviously a *misrepresentation* (or, as the trial court determined, misinformation).

Next, the Court states, in its Opinion, at page 45 that Jackson "had a reputation for gambling". How the Court conjured up this conclusion is a mystery. One thing is certain, nothing stated in the affidavit supports the conclusion either that Jackson was one of those being referred to as "individuals who had been known to be past violators of the gambling laws of the State of Ohio", or as a person "personally known [whatever that means] to the affiant in connection with his police duty as a member of the vice-enforcement unit."

Again, the affiant's testimony was that he *only* knew Dodson and that Jackson had merely been identified to him "as being on the premises and actively involved in the operation of this office." (R. 22-24). Thus, to restate the question, does this testimony support the Court of Appeals' conclusion that "Jackson . . . had a reputation for gambling," simply because a single (undisclosed) informant said he was involved in the operation of a gambling enterprise on premises for which a warrant is being sought.

Unless the usual standards for proving reputations are to be abandoned, it follows that Captain Delau could not, since he did not know Jackson, qualify as a witness as to his reputation based solely on what a single individual supposedly told him—if in fact he told him anything.

Yet, the Court, obviously because it wanted to validate this warrant, ruled none of these were misstatements. The short short question then must be, since they were not accurate statements, they must be inaccurate ones—there is no in between.

(E)

The Ohio Court of Appeals in its final shot returns to *United States v. Harris* as a crutch for a position being taken by it. Here, our Court convinced itself that *Harris* "held that an informant's personal observations coupled with the officer's knowledge of the accused's background was sufficient to establish probable cause under *Aguilar* and *Spinelli.*" Again, if this is what the Court of Appeals has gotten from *Harris,* such is truly unfortunate. This is so for the simple reason that this Court, in *Harris,* expressly rejected this thesis.

To be sure then, as stated above, an informed reading of *Harris* will show that *only* the Chief Justice, joined by Justices Black and Blackburn concurred in Part II of the plurality Opinion. Two other Justices, Stewart and White, concurred in the judgment—but for different reasons. Four other Justices expressly rejected Part II (403 U.S., at 596-600). This fact, plus the additional fact that Justice White (who concurred in *Spinelli*) and Justice *Stewart* (who dissented in the same case), could not buy Part II is significant also. This is so if for no other reason than the fact that their vote cannot be counted as being in favor of positions placed on the case by our Court of Appeals.

(F)

In ruling that the affidavit contained no misrepresentations, the Court of Appeals tried to overcome the adage that one cannot have it both ways. Here, the Court concluded that testimony of Delau shows, in spite of the clear language in the affidavit, that he had personally seen Dodson enter these premises. And, that if in fact Delau had seen Dodson enter this would have strengthened the showing of probable cause.

Overlooked by the Court is the fact that the segment of testimony[3] during which Delau says he saw Dodson enter also contains his testimony that the phrase "*people* known to me personally" referred to "Dodson" (R. 27). So again the Court cannot say, at least not with impunity, that one can read Delau's testimony as supporting their view that if the affidavit had stated Delau saw Dodson actually enter as bolstering his showing and not read his testimony that the phrase "people known to him personally" that he had seen going and coming referred to Dodson only was a gross misstatement.

Also, in the Opinion is the statement that the trial court indicated he believed Captain Delau and the statements he was making. The basis for this arbitrary conclusion is the Court's remark that "there is no question in my mind Captain Delau had the proper information." Rather than crediting the trial court with merely believing that Delau had in fact seen Dodson enter these premises (as he said was the case in his testimony) and viewing that as a fact that would have corroborated the alleged informant to a sufficient degree, our Court of Appeals says this shows the trial court believed everything Delau

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3. See segment of the Record (R. 25-27) incorporated in this Petition at pp. 18-20.

had stated. Surely this could not include the fact that the Opel had a trunk in spite of the fact.

Even this is not all, the trial court's remark is also amenable to a belief by the Court that he was convinced Delau had an informant but that he did not put sufficient information about his informant in his affidavit to support the issuance of the warrant.

CONCLUSION

One of the real problems elsewhere (—that is, in places other than Ohio, where police officers are almost automatically regarded by the courts as honest, credible and reliable) is being evidenced in the reported cases over the apparent willingness of some magistrates to simply rubber stamp their applications for warrants. This despite the virtual plethora of cases holding that courts cannot, with impunity, continue to rely solely on an affiant's assertions that his informant is trustworthy, truthful, prudent, reliable and credible. Thus, the trend has been to impose an affirmative duty upon the courts, qualified to issue warrants, to see to it that they are not being deceived. See *United States v. Dunning,* 425 F.2d 836, at 840 (1969). Also see Rule 41(C), Ohio Rules of Criminal Procedure, which expressly authorizes the production of witnesses before the magistrate to assist him in the performance of his duty to independently determine whether the privacy of our citizens should be invaded.

If this concept has any validity whatsoever, this case poses a virtual textbook example of when a warrant should not have been issued. It also shows all of the reasons why if the court felt compelled to issue this warrant, he should have required the affiant and his informant to submit to questioning under oath. This could have

resolved some of these veracity questions. But, of course, none of these things were done. And we have a situation here where, despite the affiant's testimony he was told the illegal activity was taking place on the second floor, of a multitenant structure, the warrant was for the entire premises. As to this additional facet, see *United States v. Esters*, 336 F. Supp. 214 (1972), where the Court held when law enforcement officials have prior notice of possible dual occupancy of a premises, they cannot properly seek a warrant for the entire premises but can only seek a warrant for that portion of the premises within the possession and under the control of the person whose alleged criminal activities are the basis of the entire search warrant.

For all of the reasons set forth herein, it is here being urged that the judgment of the Court of Appeals be reversed, and the judgment of the trial court reinstated.

Respectfully submitted,

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APPENDIX A

Opinion and Journal Entry of the Court of Appeals

(Dated December 19, 1974)

No. 33438

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

STATE OF OHIO,
Appellant,

vs.

ROBERT DODSON, *et al.*,
Appellees.

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

Judgment reversed.

Exc. See Journal Entry. See Opinion incorporated herein by reference.

No other error appearing in the record, this cause is remanded to the Common Pleas Court for further proceedings according to law.

It is therefore considered that said appellant recover of said appellee costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ AL I. KRENZLER
Presiding Judge

KRENZLER, *P.J.*, CORRIGAN, *J.*, MANOS, *J.* concur.

OPINION

SYLLABUS

1. When an affidavit for a search warrant sets forth the personal observations of an informant or an affiant the affidavit contains underlying circumstances from which conclusions can properly be drawn for the establishment of probable cause.

2. An informant's past performance is an underlying circumstance from which an affiant can properly conclude that he is credible.

3. In finding probable cause for a search warrant a magistrate may properly rely upon a police officer's knowledge of the criminal reputation of the suspect.

4. When a police officer's affidavit for a search warrant sets forth facts giving the issuing magistrate reason to believe that an illegal gambling operation is being conducted on the premises and the statements contained therein are not intentionally and materially false and are based upon the personal observations of the officer and a reliable

informant, the search warrant based upon that affidavit is not defective.

CORRIGAN, *J.*

This is an appeal by the State of Ohio from the trial court's finding that a police captain's affidavit did not establish probable cause for the issuance of a search warrant.

The relevant portions of the affidavit can be summarized as follows:

1. The affiant has received reliable information from an informant who has provided the Cleveland Police Department with information in many instances in the past resulting in the arrest and conviction of gambling violators.

2. The informant has advised the affiant that he has visited the premises on numerous occasions, that he has been there within the past week, that the premises are being used as a clearing house office for the promotion of numbers games, and that the person in charge is one Robert Dodson.

3. Upon receiving this information the affiant has personally maintained a surveillance of the premises for the past week and has seen persons coming and going who are known to him to be gambling violators.

4. The affiant has come to know gambling violators as a policeman for twenty-seven years and in connection with his duties as a member of the Vice-Enforcement Unit.

5. The affiant has information that Robert Dodson, who is personally known to him as having a history of clearing house violations, has entered the premises on at least three separate occasions during the past week.

6. Another individual known to be involved in gambling violations has been seen entering the premises on at least two separate occasions during the past week.

Based upon the affidavit the issuing magistrate directed that the search warrant be issued and served. Six persons were arrested and several items were confiscated, including adding machines, a calculator, clearing house slips, tapes, and more than $1,000 in cash.

The trial judge conducted a hearing on the defendants' motion to suppress the evidence and found that probable cause for the issuance of a search warrant was lacking because the affidavit did not contain facts to support the affiant's conclusions. He stated: "There is no question in my mind that Captain Delau had the proper information, but that information is not set forth and contained in the affidavit."

An examination of the record discloses that the unsupported conclusions to which the trial judge was referring were that the premises were being used as a clearing house office for the promotion of numbers games, and that the persons coming and going were known gambling violators.

We do not find these assertions to be unsupported. Affidavits are to be given their common-sense meaning and are not to be read hyper-technically. *United States v. Ventresca* (1965), 380 U.S. 102. It is clear from reading the affidavit that the two conclusions in question were based upon the personal observations of the informant and the affiant. The informant's statement that a clearing house was being operated was based upon his visits to the premises and the affiant's statement that known gamblers were coming and going was based upon his surveil-

lance and his personal knowledge of gamblers.[1] When an affidavit demonstrates that personal observations have been made by persons familiar with criminal activity, it cannot be said that the conclusions in the affidavit based upon those observations are unsupported.

On appeal appellees do not attempt to argue that the affidavit contains unsupported conclusions. Instead they raise two additional arguments:

1. The affidavit does not establish probable cause because the credibility of the informant is not sufficiently demonstrated.

2. The search warrant is invalid because it is based upon an affidavit which contains intentional and material misstatements.

We find that on its face the affidavit meets the basic two-pronged test for the establishment of probable cause for a search warrant appearing in *Aguilar v. Texas* (1964), 378 U.S. 108. That test provides that the affidavit must contain some of the underlying circumstances from which (1) the informant concluded that a crime was being committed, and (2) the affiant concluded that either the informant was credible or his information reliable.

In the present case the affidavit demonstrates that the informant is familiar with gambling operations and that he concluded that there was criminal activity based upon his personal observation of the operation. As noted above, the personal observations of an informant constitute underlying circumstances from which he can properly

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1. In finding probable cause for a search warrant a magistrate may properly rely upon a police officer's knowledge of the criminal reputation of the suspect, although rules of evidence would not permit that same information to be admitted at trial. *United States v. Harris* (1971), 403 U.S. 573.

conclude that a crime is being committed. *Jones v. United States* (1960), 362 U.S. 257; *United States v. Harris, supra.*

The affiant concluded that the informant was credible based upon the fact that the informant had provided reliable information in the past. An informant's past performance is an underlying circumstance from which an affiant can properly conclude that he is credible. *McCray v. Illinois* (1967), 386 U.S. 300; *Jones v. United States, supra.*

At this point we find that the requirements of the *Aguilar* test have been met. We wish to note, however, that the United States Supreme Court in *Spinelli v. United States* (1969), 393 U.S. 410, has set forth an alternative to the *Aguilar* test which could also be applied here. *Spinelli* emphasizes the last part of the *Aguilar* test and in essence holds that if the affidavit does not meet the *Aguilar* standards probable cause still exists if the information is corroborated so as to be as reliable as information meeting the test. In the case before us the informant's statements were corroborated by the surveillance of the premises. The original information coupled with the corroboration was sufficient to meet the *Spinelli* standards. Therefore, we find that the requirements of both *Aguilar* and *Spinelli* have been met.

The affidavit need not make out a prima facie case against the defendant nor is it necessary that the magistrate be convinced beyond a reasonable doubt. *United States v. Harris, supra*; *Spinelli v. United States, supra.* All that is required is that the affidavit set forth facts giving the magistrate reason to believe that the items in question are located on the premises. *Dumbra v. United States* (1925), 268 U.S. 435. This affidavit clearly meets that standard.

Appellees further urge this court to affirm the lower court's ruling upon the basis that the affidavit contains intentional and material misstatements. They cite *United States v. Damitz* (1974), 495 F.2d 50, a case recently decided in the United States Court of Appeals for the Ninth Circuit. *Damitz* holds that an informant's intentional and material false statements in an affidavit are not fatal to a search warrant if probable cause still exists after the false statements are omitted from the affidavit. The court went on to say that the case might be different if a government agent had made material false statements.

It is argued that the affiant made an intentional and material misstatement when he stated that known gambling violators were coming and going from the premises. While appellees contend that the affiant was referring to only one man, Robert Dodson, it is clear from the evidence adduced at the hearing that the captain was referring to three men: Dodson, who had been arrested and convicted of possession of clearing house slips; Moore, who had been arrested for gambling; Jackson, who had a reputation for gambling. A suspect's criminal reputation is properly included in an affidavit for a search warrant. *United States v. Harris, supra.* We find no misstatement here.

The affiant stated that he had information that Robert Dodson was at the premises at least three times in the past week and that another individual had been seen at the premises at least two times in the last week. Appellees characterize these as material and intentional misstatements because, written in the grammatical passive voice, they give the impression that someone other than affiant observed these persons while the oral hearing revealed that these were observations made by the affiant himself. We fail to find that these misstatements, if they be such, are either intentional or material. In their present form the state-

ments aid in establishing probable cause. Had they been written so as to reflect the fact that affiant actually observed these persons they could only have strengthened the establishment of probable cause. It is to be noted that the affidavit was prepared in the form of the third person. There is no showing that these statements were made with the intention of hiding the truth, or that they materially alter the establishment of probable cause.

Appellees also contend that an intentional and material misstatement was made by affiant when he referred to Robert Dodson as having "a history of clearing house violations" when, in fact, Robert Dodson had only one arrest and conviction for possession of clearing house slips in 1961 or 1962. Admittedly this statement gives the impression that Dodson has more than one conviction although the word "violations" can be interpreted as including criminal activity for which he has not been convicted, especially in view of the fact that the first part of the same statement reads: "Affiant states that one Robert Dodson is personally known to him in connection with his police duties as a member of the Vice-Enforcement Unit." Upon review of the record one can conclude that the affiant did overstate the fact if he meant to convey the idea of convictions. Nevertheless, in the overall language of the affidavit he does inform the magistrate that Robert Dodson's gambling reputation was personally known to him. We do not find that affiant intentionally misstated a fact. Furthermore, as in *United States v. Damitz, supra,* probable cause still exists for the issuance of the search warrant after the statement in question is omitted from the affidavit.

Appellees raise the point that the affiant testified at the hearing that he saw Jackson take a package out of the trunk of his car and bring it into the building. It was then demonstrated that the car in question had no

trunk. It is appellees' position that affiant's credibility was thereby completely destroyed and as a result the entire affidavit should fail. We do not agree.

Since there is no mention made in the affidavit of this incident of seeing Jackson take something from his car, this matter was not before the issuing magistrate. Therefore, we are dealing with affiant's general credibility and not as it relates to any statement in the affidavit. The most that can be said is that affiant's credibility was brought into question at the hearing and questions of credibility are to be passed upon by the trier of the facts. The judge, the trier of the facts in this case, indicated that he believed the affiant and the statements he was making when he said "There is no question in my mind that Captain Delau had the proper information." The statements made in the affidavit and the corroborating facts adduced at the hearing support the judge's assessment of the affiant's credibility.

The facts in the case before us are similar to those in *United States v. Harris, supra.* In that case the court held that an informant's personal observations coupled with the officer's knowledge of the accused's background was sufficient to establish probable cause under *Aguilar* and *Spinelli.* In addition to the factors in *Harris,* we have here the corroborating surveillance of the premises. We agree with counsel for appellees that one who has been convicted of a crime does not walk around "forever enveloped in probable cause." On the other hand, we point out that the requirements for the establishment of probable cause are not more stringent for suspects with prior convictions than they are for anyone else.

For the foregoing reasons the judgment of the Common Pleas Court is reversed and the case is remanded for further proceedings according to law.

APPENDIX B

Entry of Supreme Court of Ohio Denying Leave to Appeal

(Entered March 28, 1975)

No. 75-138

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,

vs.

ROBERT DODSON *et al.*,
Appellants.

MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

It is ordered by the Court that this motion is overruled.

APPENDIX C

Entry of Supreme Court of Ohio Dismissing Appeal

(Entered March 28, 1975)

No. 75-138

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,

vs.

ROBERT DODSON *et al.*,
Appellants.

APPEAL FROM THE COURT OF
APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX D

Journal Entry of Court of Common Pleas

(Filed February 13, 1974)

No. CR-11764

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY

STATE OF OHIO,
Plaintiff,

vs.

ROBERT DODSON, JOHN L. JACKSON, GIRTHA MOORE, LAVERNE NICHOLS, JESSE I. WILLIAMS and LAWRENCE MOORE,
Defendants.

JOURNAL ENTRY

All defendants in Court, represented by counsel.

Defendants Motion to Suppress Evidence and Return Property Seized granted.

Property to be returned to proper owner or premises from which taken.

Defendants discharged.

/s/ PHILLIP C. BARRAGATE
Judge

APPENDIX E

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH

AFFIDAVIT FOR SEARCH WARRANT

State of Ohio, County of Cuyahoga, ss.

Before me a Judge of the Court of Common Pleas, Cuyahoga County, Ohio, appeared Captain Carl I. Delau, and being first duly sworn, deposes and says that he is a member of the Cleveland Police Department and that he has good cause to believe that on the premises known as 10400 Buckeye Road, Cleveland, Ohio, there is a two-story green shingled - framed building, and in particular in the entire building known as 10400 Buckeye Road, which is on the corner of Buckeye Road and East 104 Street, Cleveland, Ohio and any garage or storage area furnished by said building being occupied as the office for the Sue Grair Realty Company and any other individuals there is being unlawfully kept, concealed and possed the following described contraband:

> Clearing House slips, Hit and Remit Slips, and Adding machines tabulations, and Adding machines and other paraphernalia and all other instruments used in the promotion or establishment of any policy or numbers games, or any clearing house or scheme of chance or lottery, all in violation of Section 2915.13 of the Ohio Revised Code.

Also any evidence in connection with the crime offense or contraband related to the maintenance of operation of a numbers games or clearing house or any other evidence of a crime has been committed or reasonably appears to be committed.

The facts upon which the affiant bases such belief are as follows:

The affiant states that he has received reliable information from an informant who has provided the affiant with information in the past which has proven to be reliable and which as resulted in the arrest and conviction of gambling violators.

Furthermore, the affiant states that this informant has cooperated with the Cleveland Police Department in many instances in which he has given reliable information that has lead to the arrest of several persons in connection with gambling violations including number games and other various crimes. His information involving individuals in these crimes activities has proven to be reliable by several investigations by member of the Cleveland Police Department in the past.

This informant has advised the affiant that the premises known as 10400 Buckeye Road, Cleveland, Ohio, is being used as a clearing house office for the promotion of a numbers game. This informant has advised the affiant that he has visited the above described premises on numerous occasions and that also that his last appearance at the above described premises has been within the past week. This informant has related to the affiant that numerous violations of the law with respect to clearing house operations and numbers games are being conducted at the above described premises.

The informant has related to the affiant that the person in charge of the clearing house office is one Robert Dodson.

Affiant further states in talking with the informant, the informant has advised the affiant that the building is presently being used by one Robert Dodson, who is

in charge of maintaining this building as a clearing house and for use in other crime violations.

The affiant further states that upon receiving this information he personally has maintained a surveillance of the above described building for the past week.

Affiant states that he has been a member of the Cleveland Police Department for approximately twenty-seven years and that during his period of employment he has had occasion to know many violators of the gambling laws of the State of Ohio. During his surveillance of the above described premises and affiant states that he has seen individuals who have been known to be past violators of the gambling laws of the State of Ohio enter the above described premises.

Affiant states that he has frequented the above described building known as 10400 Buckeye Road, Cleveland, Ohio, and that those people coming and going are personally known to the affiant in connection with his police duty as a member of the Vice-Enforcement Unit.

Affiant states that he has information that Robert Dodson has entered the above described building on at least three separate dates during the past week. Further affiant states that another individual known to be involved in gambling violations has been seen entering the above described building on at least two separate dates during the past week.

Affiant states that one Robert Dodson is personally known to him in connection with his police duties as a member of the Vice-Enforcement Unit, and that Robert Dodson has a history of clearing house violations.

Affiant avers that it is urgently necessary that the above mentioned premises to be searched in the day season

forthwith so as to prevent the above mentioned contraband from concealed or removed from the above described premises.

/s/ CARL I. DELAU, Capt.

SWORN to before me and subscribed in my presence this 29th day of November, 1973.

/s/ JAMES P. KILBANE
Judge, Court of Common Pleas Cuyahoga County, Ohio

APPENDIX F

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH

SEARCH WARRANT

State of Ohio County of Cuyahoga, ss.

TO: Chief of Police of the Cleveland Police Department and/or Captain Carl I. Delau, a member of the said Department

WHEREAS there has been filed with me an affidavit consisting of three pages of copy of which is attached hereto, designated as Exhibits A, A-1 and A-2 incorporated herein as though fully rewritten wherein the affiant avers that he believes and has good cause to believe that on the premises known as 10400 Buckeye Road, Cleveland, Ohio which is a two-story green shingled-framed building, and in particular the entire building known as 10400 Buckeye Road, which is on the corner of Buckeye Road and

East 104 Street, Cleveland, Ohio and any garage or storage area furnished by said building being occupied as the office for the Sue Grair Realty Company and any other individuals there is being unlawfully kept and concealed and possed the following described contraband:

> Clearing House slips, Hit and Remit slips and Adding Machines tabulations, and Adding Machines and other paraphernalia and all other instruments used in the promotion or establishment of any policy or numbers games, or any clearing house or scheme of chance or lottery, all in violation of Section 2915.13 of the Ohio Revised Code.

I am satisfied that there is probable cause to believe that the property described is being concealed on the premises above described and that grounds for issuance of this search warrant exist.

You are hereby commanded in the name of the State of Ohio with the necessary and proper assistance, to serve this warrant and search forthwith the premises named for the property specified. This warrant must be executed within three days of the date hereof. Said search should be made in the day season, and if the property, or any part thereof, be found there you are commanded to seize it, leaving a copy of this warrant and a receipt for the property taken, prepare a written inventory of the property seized and return of this warrant shall be made to Judge Norman Fuerst or any other Judge of the Court of Common Pleas of Cuyahoga County, and bring the property found on such search forthwith before said Judge, or some other judge or magistrate of the county having cognizance thereof, to be disposed of and dealt with according to law.

Given under my hand this 29th day of November, 1973.

/s/ JAMES P. KILBANE
Judge, Court of Common Pleas Cuyahoga County